



Testimony of Curtis Decker

Executive Director, National Disability Rights Network

Health, Education, Labor and Pensions Full Committee Hearing,

*Preventing Worker Exploitation: Protecting Individuals with Disabilities and Other Vulnerable Populations*

March 9, 2009

I would like to thank Senator Harkin and the other Senators here today for holding this important and timely hearing.

NDRN is a nonprofit membership organization for the federally mandated Client Assistance Program (CAP) and Protection and Advocacy (P&A) systems, created by Congress in the 1970's to protect the rights of children and adults with disabilities and their families. With a presence in every state and U.S. territory, and the District of Colombia, the CAP and P&A systems offer an advocacy and legal voice to individuals with disabilities, and aims to uncover and eliminate maltreatment and ensure compliance with laws designed to protect the rights of individuals with disabilities.

The concept that individuals with disabilities should be earning less than other workers is an outmoded concept with its origins in the creation of the Fair Labor Standards Act of the 1930's, a time when veterans and other people with physical disabilities were seeking factory jobs in the manufacturing industry. But our world has changed significantly since the 1930's. Services and supports for individuals with a disability that were only a dream in the 1930's are now a reality. The creation of assistive technology devices, advances in supported employment services, experience in the use of behavioral supports, and the concept of reasonable accommodation were not considered in the 1930's. Subsequent amendments to the § 14(c) provision in 1966 and 1986 failed to take into consideration these advancements.

It is inappropriate to single out and stigmatize workers with disabilities, especially in an era of demonstrated progression in thinking about disability through passage of such legislation as the Assistive Technology Act, the Americans with Disabilities Act, the Ticket to Work and Work Incentives Improvement Act, and the strengthening of Section 504 of the Rehabilitation Act. Employers such as Hyatt Hotels and Walgreens continually prove that individuals with a disability can meet the productivity and quality standards required of these businesses, and thus earn the minimum-wage or prevailing wage for their position.

From a public policy perspective, we should ask the question: if the § 14(c) waiver did not exist, is it something Congress and the disability community would devise today? I believe the answer to that question is “no.” That said, we must be cognizant of the consequences an immediate abolishment of section § 14(c) would have on current employees and employers, as well as individuals with significant disabilities. We must work together in the short term to improve the § 14(c) provision while Congress, the Department of Labor, disability service providers, disability advocates such as the P&A/CAP network, and others evaluate the efficacy of the § 14(c) provision.

NDRN has been working in conjunction with our affiliates, the Client Assistance Program and Protection and Advocacy systems in Iowa, Texas, Illinois, Indiana, Georgia, Missouri, South Carolina, and Wisconsin regarding the recent discovery of frightful work and living conditions for employees at Henry’s Turkey Farm in Atalissa, IA. We have also worked closely with Client Assistance Program and Protection and Advocacy systems such as Hawaii, Kansas, Louisiana, Nebraska, North Dakota, Oregon, and Washington in the past on wage and hour violations.

While the exact facts surrounding the Atalissa incident are still unclear, it’s impossible to ignore the systemic flaws that have been uncovered. In Atalissa, the weaknesses of § 14(c) and a lack of oversight enabled Henry’s Turkey Service to exploit the labor of individuals with disabilities in order to increase the profit of the business. This is outrageous.

Henry’s Turkey Service is certainly the catalyst for this hearing, but updating employment regulations for individuals with disabilities is long-overdue. But, this is not a new issue. A Government Accountability Office report in 2001 highlighted many shortcomings in the § 14(c) waiver provision. The same year, the Department of Labor Inspector General also conducted a review of how the Wage and Hour Division issues and oversees the wage certificates allowed under § 14(c) and offered specific recommendations. Since then, some progress has been made to improve oversight of the certificates.

Among other improvements, the Department of Labor has worked to eliminate redundancies in their § 14(c) records and better verify accuracy. The Wage and Hour Division is now tracking the number of staff hours their investigators devote to the special minimum wage provision and use this information to better manage employers who possess the § 14(c) wage certificate. Additionally, employers are now provided with written guidance for § 14(c) requirements and other technical assistance.

While the Department of Labor took positive steps to improve § 14(c), Henry’s Turkey Service lingers as an ugly reminder that more is still required. Inadequate oversight and compliance at worksites covered by a § 14(c) certificate still continues. To address this, NDRN offers the following recommendations:

The guidelines for employee evaluations must be more explicit and standardized.

A system of transparency must be enacted. Current data is not easily accessible, and making a FOIA request is a lengthy process and requested information cannot be received in a useful time frame or fashion.

Critical information about the § 14(c) program should be on the Department of Labor's Web site, and presented with clarity and in such detail that red flags can be detected. For example, for worksites operating with a § 14(c) certificate the percentage of employers operating under the certificate, the productivity level of these individuals, and the dates for which the certificate renewed must be easily accessible. Current regulations require the employer to maintain these records so assuring better accessibility would not represent an additional burden. Information about employers which held a § 14(c) certificate that has been revoked, not renewed, or expired should also be made easily available.

Clearly enforcement of the § 14(c) program needs to improve. However, just increasing enforcement of these provisions by the Department of Labor is not enough. Independent oversight of the program provided by the Client Assistance Program and Protection and Advocacy network is warranted. Specifically, CAPs and P&As should be allowed access to § 14(c) sites to ensure individuals with disabilities are being treated fairly, without having to maneuver difficult hurdles.

Another concern for employees with disabilities is the deduction from cash wages to cover room and board provided by an employer. Though allowed under the FLSA, to expose violations for individuals with disabilities who could be subject to exploitation, intent to make deductions should be noted on § 14(c) applications. Deductions for room and board should not be handled by the same entity. This would disincentivise exploitative room and board charges which re-claim most of or all wages paid to employees, a practice that should have expired alongside sharecropping and indentured servitude.

The role of the Office of Disability Employment Policy (ODEP) is currently vague. The role of ODEP should be clarified through statute and include a mandate to work with the Wage and Hour Division to oversee enforcement of § 14(c) wage certificates. ODEP's experience working on disability and employment issues could be better utilized to assure the proper implementation and enforcement of federal employment laws under Department of Labor's jurisdiction which impact individuals with disabilities, such as § 14(c). In fact, ODEP has already funded an analysis of the § 14(c) wage certificates in terms of Community Rehabilitation Providers, a training assistance center on sub-minimum wage, and expansion of the role of the office to assist with enforcement is a logical means to address the shortfall in oversight by DOL.

Lastly, for employers to take their responsibilities more seriously, stiffer penalties must be enacted. Though Department of Labor statute allows for revocation of a § 14(c) certificate as far back as the date of issuance or date of a violation, there is no clear provision to obtain liquidated damages for violations of Section § 14(c).

The Section § 14(c) waiver program is just one piece of the puzzle of employment for individuals with disabilities. In order to reach a comprehensive solution, we need to ultimately examine a number of issues including access to supports and services, disincentives to work within the Social Security program, and archaic attitudes by some service providers.

Thank you again for holding this hearing. I look forward to working with you and your colleagues in the House and Senate to address this issue.